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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-891

EDGAR PAUL, Chief of Police, Louisville Division of Police, and
RUSSELL McDANIEL, Chief of Police, Jefferson County Division of Police - **Petitioners**

versus

EDWARD CHARLES DAVIS, III - - **Respondent**

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR THE PETITIONERS

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v.

EDWARD CHARLES DAVIS, III - - *Respondent*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The Memorandum and Order of the United States District Court for the Western District of Kentucky dismissing the Respondent's complaint is not reported, but is printed in Appendix A of Petition previously filed herein. The opinion of the Sixth Circuit Court of Appeals, which reversed the Order of the District Court, is reported at 505 F. 2d 1180 (6th Cir. 1974) and printed in Appendix B of the Petition previously filed herein.

JURISDICTION

The judgment of the Sixth Circuit Court of Appeals was entered on October 22, 1974 (Appendix B at page 21 of Petition for Writ of Certiorari previously filed herein). The Petition for a Writ of Certiorari was filed on January 20, 1975, and granted on April 14, 1975. The jurisdiction of this Court rests upon 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

42 U.S.C. Section 1983

"Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizens of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

28 U.S.C. Section 1343

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of

Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

28 U.S.C. Section 2201

"In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other relation of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

28 U.S.C. Section 2202

"Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment."

KRS 433.236

"433.236 Detention of person suspected of shoplifting.

(1) A peace officer, security agent of a mercantile establishment, merchant or merchant's employe who has probable cause for believing that goods held for sale by the merchant have been unlawfully taken by a per-

son, and that he can recover same by taking the person into custody, may, for the purpose of attempting to effect recovery, take the person into custody and detain him in a reasonable manner for a reasonable length of time.

(2) Any peace officer may arrest without warrant any person he has probable cause for believing has committed larceny in retail or wholesale establishments."

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment I

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Amendment IV

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment V

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grant jury, except in cases arising in the land or naval forces, or in the militia, when in

actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment IX

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Amendment XIV, Section 1

". . . nor shall any state deprive any person of life, liberty, or property, without due process of law; . . ."

QUESTION PRESENTED

Did the Court of Appeals below err in reversing the judgment of the District Court below and in holding that the distribution by the Petitioners of a flyer for the use and protection of local merchants and business establishments entitled "Active Shoplifters" and containing the identity of the Respondent, whose shoplifting arrest and charge had been filed away, was of such grave magnitude as to constitute an invasion of the civil rights secured to the Respondent under the Constitution and to require the invocation of Federal jurisdiction in accordance with 42 U.S.C. Section 1983?

STATEMENT OF THE CASE

The Respondent, Edward Charles Davis III, filed suit on December 12, 1972, in the United States District Court for the Western District of Kentucky under 28 U.S.C. Sections 1343(3)(4), 2201, and 2202, and 42 U.S.C. Section 1983, alleging a deprivation of his civil rights in general and violation of his right of privacy specifically. The Respondent's suit was brought against the Petitioners, Edgar Paul, who was Chief of Police of the Louisville Division of Police at the time the Respondent's claim arose, and Russell McDaniel, who was the Chief of Police of the Jefferson County Police Department both at the time the Respondent's claim arose and presently.

The Respondent was arrested on June 14, 1971, by private security officers and charged with a violation of Kentucky Revised Statutes 433.234, Shoplifting. On September 21, 1971, the case against the Respondent was "filed away with leave". On December 11, 1972, nearly nineteen (19) months after the case was filed away, the Respondent's case in Police Court was dismissed.

On or about December 5, 1972, the Petitioners authorized the preparation and dissemination to certain local merchants and business establishments in Jefferson County, Kentucky, a flyer containing names and photographs of persons suspected of being active shoplifters in the area. The purpose of the flyer was not to inform the public at large, but rather to alert local

businessmen so that they in turn could alert their security personnel to watch for these subjects. The flyer further stated that the persons contained therein had been arrested during 1971 and 1972 and charged with the crime of shoplifting.

On December 12, 1972, the instant action was initiated in the United States District Court for the Western District of Kentucky as a class action, alleging as unconstitutional the distribution of the aforementioned flyers. Furthermore, the Respondent demanded compensatory and punitive damages against the Petitioners. The Respondent based his claim for damages upon the theory that the Petitioners had deprived him of his constitutional right to privacy. On January 8, 1973, the District Court held a hearing on the Respondent's motion for a preliminary injunction. The District Court thereafter denied the Respondent's motion. On November 16, 1973, the District Court entered its judgment dismissing the Respondent's suit. (See Appendix A at page 17 of the Petition for Writ of Certiorari previously filed herein.)

Subsequently, the Respondent appealed to the United States Court of Appeals for the Sixth Circuit. On October 22, 1974, the Court of Appeals reversed the District Court's judgment and remanded the case for further proceedings. (See Appendix B at page 21 of the Petition for Writ of Certiorari previously filed herein.) In so doing, the Court of Appeals held that the Respondent's claim did, in fact, allege a violation of rights guaranteed by the Constitution.

On January 20, 1975, the Petitioners filed a Petition for Writ of Certiorari seeking review of the judgment rendered by the Sixth Circuit Court of Appeals. On April 14, 1975 this Honorable Court granted said Petition.

SUMMARY OF ARGUMENT

The Petitioners' actions in the case at bar did not violate any "rights, privileges or immunities secured by the Constitution and laws" of the United States to the Respondent.

The distribution of the flyer in question to local merchants and business establishments was not of such grave magnitude as to constitute an invasion of the Respondent's alleged constitutional right of privacy. This Court has recognized a fundamental right of privacy in only extremely narrow circumstances. The Petitioners contend that its scope should not be expanded to include the Respondent's claim.

Furthermore, the Petitioners' actions did not result in a denial of due process of law to the Respondent. The Petitioners contend that the claim advanced by the Respondent constitutes nothing more than a potential tort case for defamation of character or invasion of privacy for which the proper remedy is a civil suit in the state courts. Under these circumstances, the Petitioners respectfully submit that the Respondent is not entitled to a full due process hearing *before* something of a potentially defamatory nature is said or written about him.

Since the Respondent has failed to state a claim for relief which the Federal courts have jurisdiction to entertain, the Petitioners respectfully submit that the judgment of the Sixth Circuit below should be reversed and the Respondent's claim dismissed.

ARGUMENT

The distribution by the Petitioners solely to local merchants and business establishments for their own internal use and protection of a flyer entitled "Active Shoplifters" and containing the identity of the Respondent, whose shoplifting arrest and charge had been filed away, was not of such grave magnitude as to constitute an invasion of the civil rights secured to the Respondent under the Constitution and to require the invocation of Federal jurisdiction in accordance with 42 U.S.C. Section 1983.

The District Court below held that the actions taken by the Petitioners did not constitute an invasion of any constitutional rights, privileges or immunities secured to the Respondent. On appeal, the Circuit Court below reversed and remanded. The Petitioners respectfully disagree with the Sixth Circuit's opinion.

The Respondent bases his claim for relief in the federal courts upon 42 U.S.C. Section 1983, which states:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities

secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

The Klu Klux Act of 1871 was the genesis of 42 U.S.C. Section 1983. It was originally intended to permit the institution of civil actions by aggrieved parties seeking redress of discriminatory acts undertaken against emancipated black citizens. In more than a century of active usage this statute has become the primary procedural weapon for persons seeking to wage warfare in the federal courts on ever-expanding legal frontiers. In so doing, the courts have permitted the utilization of the statute to be broadened far beyond its intended purpose. Nonetheless, it is well-established that in order to maintain an action under 42 U.S.C. Section 1983 one must establish two essential elements: (1) that the defendant acted under "color of law" *and* (2) that such actions deprived the plaintiff of some right, privilege, or immunity secured to him "by the Constitution and laws" of the United States. *Adickes* v. *S. H. Kress & Co.,* 398 U. S. 144, 150, 26 L. Ed. 2d 142, 150, 90 S. Ct. 1598 (1970); *Mimms* v. *Philadelphia Newspapers, Inc.,* 352 F. Supp. 862, at 865 (E.D. Pa. 1972).

In the instant case the Respondent contends that the Petitioners violated his right to privacy and/or his right to procedural due process of law by including the Respondent's name and photograph in a list circulated to local merchants and business establishments. It is undisputed that the Respondent was arrested and charged with the crime of shoplifting in June, 1971. In

September, 1971, the charges against the Respondent were "filed away with leave". Under Kentucky law, the disposition of "filing away" a criminal warrant is "not a final determination thereof but is an indefinite continuance of the case which may be reinstated on the docket upon reasonable notice at any time after such an order is entered." *VanArsdale* v. *Caswell,* Ky., 311 S. W. 2d 404 (1958). On December 5, 1972, the Petitioners circulated the aforementioned flyer to the local merchants. The cover letter accompanying the list stated *inter alia* that the persons named therein had been arrested during 1971 and 1972 for shoplifting (Single Appendix, page 9). In addition to the cover letter, the flyer consisted of five pages of photographs and names of 121 persons. At the top of each of the five pages, the words "Active Shoplifters" were printed (Single Appendix, pages 11-15).

It is undisputed that at the time the flyer in question was distributed the Respondent had been arrested for shoplifting in 1971 and his charge had been indefinitely continued by the "filing away". It was not until after the dissemination of the flyer that the Respondent was able to get the charges against him dismissed. The Respondent has brought the instant action under 42 U.S.C. Section 1983 in an effort to redress his complaint against the usage of the words "Active Shoplifters" at the top of the page wherein his name and photograph appeared in the list (Single Appendix, page 12).

For purposes of determining whether the Respondent has stated a claim for relief or whether the federal

courts have jurisdiction over his cause of action, we shall assume that the actions taken by the Petitioners were under "color of law". We shall focus our attentions upon the second essential element to be established in any effort to maintain an action under 42 U.S.C. Section 1983. In so doing, the central issue is whether the Petitioners' actions deprived the Respondent of any "rights, privileges or immunities" secured to him by the Constitution or laws of the United States. As such, the Respondent contends that the Petitioners' acts constituted a violation of the Respondent's right of privacy and/or right of procedural due process of law.

Let us first focus upon the Respondent's alleged right of privacy. It should be noted that nowhere in the United States Constitution is any mention made of a "right of privacy". In fact, this Court has stated that there is no "general constitutional right to privacy." *Katz* v. *United States,* 389 U. S. 347, 350, 19 L. Ed. 2d 576, 581, 88 S. Ct. 507 (1967). Furthermore, this Court went on to point out in the *Katz* case:

> ". . . the protection of a person's *general* right to privacy—his right to be left alone by other people—is, like the protection of his property and of his very life, left largely to the law of the individual State." 389 U. S. 347, 350, 19 L. Ed. 2d 576, 581, 88 S. Ct. 507 (1967).

It should be noted that "not every civil right is a right derived or secured by the Constitution or laws of the United States." 1 Barron and Holtzoff, Federal Practice and Procedure, Section 37. In fact, it has long been established that one's right of privacy sounds

in tort and gives rise to a common law cause of action in its own name. Warren and Brandeis, "Right to Privacy", 4 Harv. L. Rev. 193 (1890).

Notwithstanding these fundamental general principles, the Petitioners recognize that in certain circumstances the interest of a citizen in his personal privacy can be elevated to a constitutional right. For example, this Court recognized that the special nat re of the marital relationship was imbued with "a right of privacy older than the Bill of Rights". *Griswold* v. *Connecticut,* 381 U. S. 479, 486, 14 L. Ed. 2d 510, 516, 89 S. Ct. 1678 (1965). Furthermore, in reversing a state law prohibiting the use of contraceptives by married couples, this Court ruled that the rights secured by the First, Fourth, Fifth and Ninth Amendments have certain "penumbras" which create "zones of privacy".

The Petitioners would agree with the wisdom of the holding in *Griswold.* However, we cannot agree with the contention that the recognition of a carefully defined "zone of privacy" should be expanded to include the cause of action brought by the Respondent. Certainly, the *Griswold* decision cannot be relied upon in an effort to elevate a common law invasion of privacy into the deprivation of a constitutional right. That proposition was advanced and rejected in *Travers* v. *Paton,* 261 F. Supp. 110 (D. Conn. 1966). Therein, the plaintiff was a convict who contended that the defendants violated his constitutional right of privacy by televising his parole hearing without his prior knowledge or approval. In granting Summary Judgment to the de-

fendants, the court pointed out that the plaintiff had not established a claim for relief cognizable under 42 U.S.C. Section 1983. Instead, the plaintiff had merely presented a case of common law invasion of privacy. The court stated that the civil rights statute "encompasses a much narrower field", and excludes the type of action presented by the plaintiff. 261 F. Supp. 110, at 112. The court pointed out that the true objective of the civil rights statute is "to permit in federal courts only cases which have valid justification for being litigated in the federal system." 261 F. Supp. 110, at 112. In holding that the claims raised by the plaintiff were not of the nature designed to be litigated in the federal system, the court addressed itself to the right of privacy allegedly established in the *Griswold* decision:

> "It misses the heart and spirit of the *Griswold* case to casually infer an intent to adopt into the Constitution the entire body of the tort law right to privacy." 261 F. Supp. 110, at 113.

In the case at bar, the action of the Petitioners may have defamed the Respondent. Their actions may have invaded the Respondent's privacy. Since these are common law torts under the law of Kentucky, the proper forum for the Respondent's cause of action lies in the state courts of Kentucky.

It is well-settled that a defamation claim is not cognizable under 42 U.S.C. Section 1983. *Church* v. *Hamilton,* 444 F. 2d 105 (3rd Cir. 1971); *Peoples Cab Company* v. *Bloom,* 472 F. 2d 163 (3rd Cir. 1972); *Mimms* v. *Philadelphia Newspapers, Inc.,* 352 F. Supp. 862 (E.D. Pa. 1972); *Johnson* v. *Hackett,* 284 F. Supp. 933 (E.D. Pa. 1968); and *Brooks* v. *Dunn,* 376 F. Supp. 976 (W.D. Va. 1974).

The Petitioners have discovered only one case in which an invasion of privacy by police officers was held to give rise to a cause of action under 42 U.S.C. Section 1983. In *York* v. *Story,* 324 F. 2d 450 (9th Cir. 1963), the court held that where the defendants, while acting as city police officers, caused the plaintiff, who had come to the police station to complain of an assault, to be photographed nude in indecent poses, over her objections, and subsequently circulated the photographs among the police personnel, then the defendants were liable under the Civil Rights Act for invading the right of privacy of the plaintiff. The court was rightfully shocked by the unwarranted actions of the police officers in that case, and stated:

> "We cannot conceive of a more basic subject of privacy than the naked body. The desire to shield one's unclothed figure from view of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity . . . Nor can we imagine a more arbitrary police intrusion upon the security of that privacy than for a male police officer to unnecessarily photograph the nude body of a female citizen who has made complaint of an assault upon her, over her protest . . . and to distribute those photographs to other personnel of the police department despite the fact that such distribution of the photographs could not have aided in apprehending the person who perpetrated the assault." 324 F. 2d 450, at 455.

In a case somewhat similar to the case at bar, the Ninth Circuit distinguished its earlier decision in *York* and held that the plaintiff failed to allege facts which, if proven, would establish that he had been deprived of any right secured by the Constitution. *Baker* v. *Howard,* 419 F. 2d 376 (9th Cir. 1969). In that case, the plaintiff alleged that after the police had investigated a "suspicious instant" involving him, which apparently did not result in any arrest, the police officers released statements to a local radio station indicating that the appellant therein had committed a crime. The radio station, also a party defendant, then broadcast the reports to the community at large. The combined police and radio station conduct directly resulted in the loss of the appellant's teaching position. In upholding the District Court's dismissal of the case due to a failure to state a claim for relief under 42 U.S.C. Section 1983, the Circuit Court ruled:

> "Under some circumstances, there can be such a gross abuse of privacy as to amount to an abridgement of fundamental constitutional guarantees . . . but the invasion of privacy here complained of is not, in our opinion, so flagrant that it calls for the invocation of the Constitution." 419 F. 2d 376, at 377.

It should be noted that the police actions alleged in *Baker* went much further than the actions undertaken by the Petitioners herein. There was no arrest or formal charge placed against the appellant in the *Baker* case. The defamatory statements were transmitted by the police to a public radio station and disseminated to

the entire community. Finally, the actions by the police officers and the radio station directly resulted in the termination of the appellant's employment.

As contrasted with the facts alleged in the *Baker* case, the Respondent herein was arrested and formally charged with the crime of shoplifting. His charges were filed away with leave to be reopened. The Petitioners circulated the flyer in question solely to local merchants and business establishments for the specific purpose of alerting said businessmen so that they in turn could alert their security personnel to watch for the subjects listed in the circular. The flyer was intended for the private use of local merchants in aiding them in their efforts to thwart shoplifting. It was not intended to be distributed to the public at large. Furthermore, the evidence introduced by the Respondent clearly demonstrates that his job was neither terminated nor placed in serious jeopardy (Single Appendix, pages 52-59). As such, the salient facts in the case at bar are less stringent than those in the *Baker* situation. Therefore, if no violation of a constitutionally protected right of privacy could be found in the *Baker* case, then it stands to reason that no violation of a similarly alleged right should be found in the instant case.

Two recent Circuit Court decisions have addressed the issue of police officers disseminating information to persons outside the police department, and held that such disseminations did not constitute violations of any rights secured by the Constitution. In *Rosenberg* v. *Martin,* 478 F. 2d 520 (2nd Cir. 1973), the Second Cir-

cuit reversed the District Court and held that a state prisoner's complaint which alleged that a police inspector had deliberately given various news media false information aimed at labeling the appellee as a "murderer" failed to state a cause of action under the Civil Rights Act for violation of the prisoner's constitutionally protected right of privacy. Herein, the Court distinguished the circumstances in *York, supra,* and adopted the holding in *Baker, supra.*

In *Tosh* v. *Buddies Supermarkets, Inc.,* 482 F. 2d 329 (5th Cir. 1973), the Fifth Circuit affirmed the District Court's judgment dismissing the plaintiff's complaint. In this case, a police detective, following an incident at a supermarket during a unionization campaign, complied with the request of the supermarket security chief for background information about the union organizers in order to enable the supermarket management to deal effectively with any similar future incidents. Subsequently, without the knowledge of the police officials, the supermarket management published the police rap sheets. The Circuit Court held that such action was not under color of state law. However, in its dictum, the Court went on to state:

> "The main argument which plaintiffs advance is that the dissemination of the arrest records to non-law enforcement persons or for non-law enforcement purposes violates their constitutional right to privacy. The right to privacy is not expressed in the Constitution . . . all we say here is that the Constitution does not bar a state agency from furnishing such information to those who present a legitimate need for and interest in the material." 482 F. 2d 329, at 332.

Certainly, it cannot be questioned that retail merchants have a legitimate interest in protecting their goods from theft. Under Kentucky law, merchants are directed to apprehend and detain any person suspected of shoplifting on their premises. K.R.S. 433.236. Thus, under the rationale in *Tosh* cited above, the Petitioners should not be prohibited from furnishing the information in question to local merchants.

Under the circumstances alleged in the instant case, the Petitioners respectfully submit that the Respondent has not stated a claim for relief on the grounds of a deprivation of his alleged constitutional right of privacy. Thus, we must focus our attention upon his claim that the actions taken by the Petitioners deprived him of procedural due process of law as guaranteed by the Constitution.

In reversing the District Court, the Sixth Circuit placed considerable emphasis upon the alleged denial of due process. The Circuit Court founded its decision upon this Court's ruling in *Wisconsin* v. *Constantineau,* 400 U. S. 433, 27 L. Ed. 2d 515, 91 S. Ct. 507 (1971). In that case, a police chief, pursuant to the procedures set forth in a state statute, without granting any advance notice or opportunity to be heard, caused to be posted in all local retail liquor outlets a notice forbidding sales or gifts of liquor to the appellee for a period of one year. The appellee sued the police chief for damages and injunctive relief, challenging the constitutionality of the state statute. A three-judge court held the act unconstitutional on its face and issued an injunction.

This Court affirmed that judgment on a six-three decision.

The factual situations presented in the *Constantineau* case and the instant case are considerably different. The *Constantineau* case involved the unconstitutionality of a state statute which deprived a person of a due process hearing prior to the taking of official action in accordance with the procedures set forth in that statute. In the case at bar, no state statute is in question. Herein, the Petitioners were not directed by any statute, regulation, or ordinance to take any action whatsoever relative to the preparation and dissemination of the flyer. They did so independently of any directions or authority. In so doing, they acted alone.

In its decision in the *Constantineau* case, this Court talked in terms of the application of a "badge of infamy" to a citizen in addition to the deprivation of an obvious property right—the right to purchase alcoholic beverages. The application of that decision has caused some considerable confusion throughout the federal judiciary. Some decisions construe *Constantineau* most narrowly and have expressed the view that the Wisconsin statute struck down in that case failed under the Fourteenth Amendment because it did not provide for a hearing before prohibiting the sale of liquor to the appellee. (*Pugh* v. *Rainwater,* 332 F. Supp. 1107 (S.D. Fla. 1971) and *Greene* v. *The First National Exchange Bank of Virginia,* 348 F. Supp. 671 (W.D. Va. 1972).)

Generally, the *Constantineau* decision has been applied in conjunction with the subsequent ruling of this

Court in *Board of Regents* v. *Roth,* 408 U. S. 564, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972). In *Roth,* this Court found that a state university's failure to rehire an assistant professor without a hearing after the expiration of the single academic year for which he had been hired did *not* constitute a deprivation of liberty or property. In that case, no allegation damaging to the teacher's reputation had been made by school officials and loss of his job in and of itself did not amount to a deprivation of liberty or property. The teacher was at liberty to seek employment elsewhere. Therefore, his civil rights action failed. In so holding, this Court stated:

> "The requirements of procedural due process apply only to the deprivation of interest encompassed by the Fourteenth Amendment's protection of liberty and property. When protected interests are implicated, the right to some type of prior hearing is paramount. But the range of interest protected by procedural due process is not infinite." 408 U. S. 564, at 569, 33 L. Ed. 2d 548, at 556.

In underscoring the application of the *Constantineau* and *Roth* decisions to the case at bar, the Sixth Circuit relied upon testimony advanced by Mr. Albert Allen at the evidentiary hearing held before the District Court (Appendix B at pages 27 and 28 of the Petition previously filed herein.) The Petitioners respectfully submit that Mr. Allen's testimony presented by the Respondent went beyond the statements quoted in the Circuit Court's opinion. Mr. Allen also

stated that he had not reassigned the Respondent as a result of the circulation of the flyer. Furthermore, he testified that he had not restricted the Respondent's employment activities in any manner. Finally, he testified that he had not considered terminating the Respondent's employment as a result of the dissemination of the flyer in question (Single Appendix, pages 52-59). Contrary to the situations presented in *Constantineau* and *Roth,* the Respondent has failed to demonstrate any deprivation of liberty or property arising from the dissemination of this flyer. At the evidentiary hearing, the Respondent introduced no evidence indicating that he had been denied access to any stores or business establishments as was the case in *Constantineau.* The situation at bar is highly distinguishable from the primary cases relied upon by the Sixth Circuit in rendering its decision herein.

The Petitioners respectfully submit that the Respondent has alleged and demonstrated at best a cause of action for a tortious invasion of privacy and/or defamation of character. Furthermore, the Petitioners submit that a person is not entitled to a full due process hearing *before* something of a potentially damaging or defamatory nature is said or written about him. Under those circumstances, the Respondent's appropriate remedy is to bring an action in the state courts for injunctive relief and/or damages against the Petitioners for an alleged tortious invasion of privacy. The charges brought by the Respondent in the case at bar simply do not state a claim upon which relief can be granted under 42 U.S.C. Section 1983 and are not cognizable under the jurisdiction of the federal courts.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Circuit Court below should be reversed, and the Respondent's claim dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, J. Bruce Miller, one of the attorneys for Russell McDaniel, Petitioner herein, acting on behalf of all counsel for both Edgar Paul and Russell McDaniel, and being a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 29th day of May, 1975, I served copies of the foregoing Brief for Petitioners along with the Single Appendix on Edward Charles Davis, III, Respondent, by mailing copies in duly addressed envelopes, with first class postage prepaid, to his respective attorneys of record, as follows:

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